INDEX

OPINIONS BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT 3
1. Denial of Due Process 4
2. Court of Appeals' Ignoring Its Own Mandate 7
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 10
APPENDIX
A. Opinion of Court of Appeals dated June 24, 1965 11
B. Opinion of District Court dated June 24, 1966 22
C. Opinion of Court of Appeals dated April 5, 1967. 30

CITATIONS

CASES CITED:

James v. Pennsylvania General Insurance Company, __ F.2d __ (C.C.A. D.C. 1966) 9
Murchison, Re, 349 U.S. 133 8
Payne v. Lee, 24 N.W.2d 259, 222 Minn. 269 (1946) 8
Sanford Ford & Tool Co., Re, 160 U.S. 247 9
United States v. Grinnell Corp., 384 U.S. 536 (1966) 8

STATUTES CITED:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1341 3
28 U.S.C. § 144 . . . . . 2, 3, 6, 7

RULE CITED:

Federal Rules of Criminal Procedure, Rule 12(b)(2) 8
Federal Rules of Criminal Procedure, Rule 48(b) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

JOHN W. TYNAN, GENE Z. HANRAHAN,
and WILLIAM T. P. SHEA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 5, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 24, 1965 remanding the case to the United States District Court for the District of Columbia for a hearing on the speedy trial issue, is reported at 348 F.2d 363 (C.C.A. D.C.) and is printed as Appendix A to this petition.

The opinion of the United States District Court on the remanded hearing, dated June 24, 1966, is not reported. It is printed as Appendix B to this petition.

The opinion of the Court of Appeals on petitioners' appeal from the order of the District Court on the remanded hearing, dated April 5, 1967, is printed as Appendix C to this petition. It is not yet reported.

JURISDICTION

The order and judgment of the Court of Appeals was entered on April 5, 1967. (App. C) A timely petition for rehearing en banc was denied on May 18, 1967. The Chief Justice signed an order on June 16, 1967, extending the time for petitioners to file their petition for writ of certiorari to July 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether it is a denial of due process to force a defendant, over his timely objection, to a remanded hearing before a judge who will act as both judge and jury, when that judge in the course of the trial of the case had expressed a disbelief in the credibility of the defendant and an opinion on the merits of the sole issue to be decided at the remanded hearing.

2. Whether the claim of such denial of due process is open to a defendant who objected to the judge, not on the constitutional ground, but on the statutory provisions of 28 U.S.C. § 144, and did not assert the constitutional basis for

his objection until he filed his petition for rehearing in the court of appeals.

3. Whether the claim of such denial of due process is available to one of three defendants who himself did not object on any ground to the hearing judge.

4. Whether the district court and the court of appeals ignored the earlier mandate of the court of appeals which set forth with particularity the questions to be decided on the remanded hearing.

5. Whether a federal prosecuting attorney, in the face of repeated demands for speedy trial by the defendants, can drop an indictment (without prejudice) and then delay presenting the charge to another grand jury for about one year for no better reason than that he chooses to devote the time to other matters.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, Constitution of the United States

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

STATEMENT

Petitioners were convicted in the United States District Court for the District of Columbia of violations of the mail fraud statute, 18 U.S.C. § 1341. On appeal to the United States Court of Appeals for the District of Columbia Circuit, that court remanded the case to the District Court for a factual hearing on petitioners' claim of denial of a speedy trial. (App. A, p. 11)

The mail fraud trial had been conducted by Honorable John J. Sirica, judge of the United States District Court for the District of Columbia, and the remanded hearing was assigned to the same judge. Thereupon petitioners Hanrahan and Shea sought the removal of the judge under the provisions of the prejudice statute, 28 U.S.C. § 144. When the

judge refused to step aside, the petitioners applied for writs of mandamus, but the United States Court of Appeals denied their petitions on February 24, 1966. Before testimony was begun in the remanded hearing, petitioners Hanrahan and Shea requested the judge to step aside by reason of their affidavits of prejudice, which request the judge denied. Judge Sirica conducted the remanded hearing, and on June 24, 1966, made findings of fact and conclusions of law adverse to petitioners (App. B) and ordered that the judgments of conviction stand. From this order petitioners took an appeal to the United States Court of Appeals for the District of Columbia Circuit, which on April 5, 1967, affirmed. (App. C)

FACTS RELATING TO REASONS FOR GRANTING WRIT

The headings below in this Statement are identical to the topical headings in the next section of this petiton, Reasons for Granting the Writ.

1. Denial of Due Process. Petitioners were forced to the remanded hearing before the same judge who had stated during the mail fraud trial (a) that he did not believe Hanrahan or Shea under oath and had also stated (b) that from what he had heard about the case he did not think petitioners were denied a speedy trial.

(a). *Disbelief of Hanrahan and Shea.*

> "But I was waiting to hear these people, particularly the officers of this company, and I haven't heard Mr. Tynan and Mr. Hanrahan yet, but I have heard Mr. Shea, and nothing about his testimony convinces me that he is telling the truth about this situation. I was waiting to hear what he said, and so I can express my opinion as to him up to this point.
>
> "They talk about a plea of guilty, pleading nolo contendere. They want everything their way. They want to plead to what they want to plead to. In my opinion, this case justifies a plea of guilty to whatever count the Government is willing to accept on

the part of Mr. Shea. He has not convinced me that he is telling the truth or is a truthful witness. * * *" (Original transcript of mail fraud trial, Vol. 32, pp. 3734-35).

"THE COURT: In connection with this motion of the defendants Hanrahan, Tynan, and Shea, for copies of the transcript, yesterday I read the affidavits attached thereto. It seems like the affidavit signed by Mr. Tynan is the only one that is ample for the Court to grant the request on. The other two probably should get some money. * * *" (*Id.* Vol. 23, p. 2650.)

"[Counsel for defendants]: I would like to say, Your Honor, how in the world are these defendants going to get in touch with forty or fifty witnesses when they are bankrupt?

"THE COURT: Well, now, just because they say they are bankrupt doesn't make it a fact.

"[Counsel for defendants]: They said it under oath.

"THE COURT: I don't care whether they said it. [*sic*] There are plenty of affidavits filed to proceed in forma pauperis that are not worth the paper they are written on. * * *" (*Id.* Vol. 39, p. 4619.)

"THE COURT: Frankly, I will say it on the record, and I am entitled to express my opinion, and I can tell the jury, which I never do, but I can tell the jury, according to a case in the Supreme Court, that I don't believe Mr. Shea, that I am not going to believe anything he said, but I am not the judge of the facts in this case, that you, the jury, are the ones that judge the facts, and it is up to you to judge whether or not you believe him or not.

"I don't think the defendant gets a fair trial if the Judge expresses his opinion about the veracity of a witness, and I never do it, and I hope I will never do it, but to be quite frank with you, and speaking with you frankly for the record, this Mr. Shea has not impressed me one bit as being an honest, truthful witness, to be perfectly frank with you, and that is my state-

ment as an observer, and I have no interest in the outcome of the case, other than to see that justice is done. * * *" (*Id.* Vol. 32, p. 3731.)

"THE COURT: But I am not the fact finder, and I am not on that jury. I could make very short work as to the decision I might render in this case, and that goes for all four defendants. But I am not the fact finder, and I am saying this out of the presence of the jury, and this jury will never know, when I charge this jury, by the inflection of my voice, how I personally feel about this evidence." (*Id.* Vol. 47, p. 5756.) [During discussion of proposed jury instructions.]

(b). *Opinion as to the Issue.*

"THE COURT: Well, I am not going to overrule Judge Pine, and I feel this way about it: The matter has been heard, it is in the record, and the objection is preserved, and from what I have seen, I don't think that you were denied a speedy trial, from what I have heard of this case. * * *" (*Id.* Vol. 47, p. 5696.)

The remanded hearing was a factual hearing to determine whether petitioners had been denied their constitutional right to a speedy trial and their right to prompt indictment under Rule 48 (b) of the Federal Rules of Criminal Procedure. The judge at that remanded hearing would be the sole trier of the facts. Petitioners were potential witnesses at that hearing.

It has never been denied that petitioners persistently demanded a speedy trial. 348 F.2d 363 (C.C.A. D.C.); 38 Trial Transcript, p. 4423.

Petitioners Hanrahan and Shea, by affidavits of prejudice, petitions for mandamus, and a motion before testimony was begun in the remanded hearing (Transcript of Remanded Hearing, Vol. 1, p. 18) sought the removal of Judge Sirica under the provisions of 28 U.S.C. § 144. They did not base their objection to the judge on the right of due process under the Fifth Amendment until their petition for rehearing in the United States Court of Appeals for the Dis-

trict of Columbia Circuit. Petitioner John W. Tynan did not object to the hearing judge, but joined in the petition for rehearing. In this petiton no point is made of the denial of statutory rights under 28 U.S.C. § 144.

2. Ignoring of Mandate. The Court of Appeals by its decision of April 5, 1967, ignored its own previous mandate of June 24, 1965.

In its mandate of June 24, 1965, the Court of Appeals stated:

> "* * * If the court should find that all the delay attributable to the prosecutor was necessary for fair and just prosecution of the charge of mail fraud, then the convictions will stand. * * *" [Here followed other alternatives.] (App. C, p. 30)

Earlier in its opinion the court had stated:

> "* * * In this case, however, an analysis of the reasons must be made. The complexity of the alleged scheme and the number of witnesses needed to prove the charges indicate that a considerable time for preparation may have been justifiable. Moreover, after transfer to the District of Columbia it is reasonable to assume that some time was needed by the Government to make the changes necessitated by the new trial setting. * * *" (App. C, p. 30).

Originally the petitioners were indicted in Puerto Rico, but the case was transferred to the District of Columbia in June 1960 on motion of petitioners for a change of venue. The government dropped that indictment without prejudice to bringing a new one. Seventy-six weeks elapsed between the Government's announcement that it would not proceed on the old indictment and the filing of the second indictment. At the remanded hearing the Government's evidence was that during twenty-five weeks of that period the government attorney to whom the case was assigned carried a heavy load of other criminal cases, and that during another twenty-three weeks of that period no attorney was even assigned to the case. (Transcript of Remanded Hearing, Vol. 4, p. 331.)

REASONS FOR GRANTING THE WRIT

1. Denial of Due Process. Petitioners were forced to the remanded hearing before the same judge who had stated during the mail fraud trial (a) that he did not believe Hanrahan or Shea under oath and had also stated (b) that from what he had heard about the case he did not think petitioners were denied a speedy trial.

Is it a denial of due process to force a convicted defendant to a remanded hearing before a prejudiced judge who acquired his prejudice in a judicial proceeding (here, the mail fraud trial)? This is an important question of federal law which has not been settled but should be. It is the usual practice in the District of Columbia to refer remanded hearings to the trial judge.

This Court in *Re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1954), held it to be a violation of due process under the Fourteenth Amendment for a state judge who had acted as a one-man grand jury to conduct a contempt trial against witnesses accused as a result of his investigation. And see *Payne v. Lee*, 24 N.W.2d 259, 222 Minn. 269 (1946).

The point does not come too late, since it goes to the jurisdiction of the court to conduct the hearing. Rule 12 (b) (2), Federal Rules of Criminal Procedure.

The point is available to petitioner Tynan, although he did not object to the hearing judge, for the reason that as a practical matter it would be impossible to make any distinction among the defendants at the remanded hearing. Their rights to a speedy trial were identical.

United States v. Grinnell Corp., 384 U.S. 536, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966), is not applicable. The facts are totally different. Also, that case dealt, not with constitutional due process, but with the artificial benefits of a statute which requires removal of a judge against whom an affidavit of sufficient content is filed, whether it be true or false. It is one thing to withdraw the inevitable

casualties of judicial administration from the operation of that statute; it would be quite another to force a defendant to hearing before a judge who had declared on record an opinion as to the sole issue in the hearing and a disbelief in the credibility of two of the three defendants who would appear before him. A juror who had made the statements which the judge in this case had made would be excluded from the hearing; so should the judge, who would be all twelve jurors. Whether the judge could in fact be fair becomes almost irrelevant. His presiding would harm the image of justice.

2. Ignoring of Mandate. The Court of Appeals by its decision of April 5, 1967, ignored its own previous mandate of June 24, 1965.

This Court in the exercise of its supervisory power should require federal courts of review to follow their own mandates, and not permit one panel of the review court to set the rules for a remanded hearing and another panel to ignore them.

In this case the Court of Appeals in remanding the case to the District Court clearly left for consideration only whether, by reason of the complexity of the scheme and the adjustment to the transfer of the case from Puerto Rico to the District of Columbia, the delay in presenting the case to the grand jury was "all" "necessary for fair and just prosecution of the charge of mail fraud." But the District Court and the Court of Appeals by its decision of April 5, 1967, found in effect that the delay was justified even if it was not all needed for the mail fraud case.

A mandate of an appellate court must be respected by it and by the district court. *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 256, 40 L. Ed. 414, 416, 417 (1895). Compare Danaher, Jr., concurring in *James v. Pennsylvania General Insurance Company*, __ F.2d __ (C.C.A. D.C. 1966).

This Court in the exercise of its supervisory power should strike down a rule which permits a federal prosecutor to

ignore a defendant's repeated demands for speedy trial and bypass the court's supervision of the prosecution by delaying presentation of the case to a grand jury for no reason except its own self-serving choice to devote its time to other matters. The unnecessary time in this case was 48 weeks (of a total of 76 weeks) when no attorney was assigned to the case or when the attorney who was assigned gave his time to other cases rather than "the charge of mail fraud." If the prosecutor's arbitrary neglect of a citizen's rights are approved by the highest review court of the jurisdiction, his constitutional rights become meaningless.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Myron G. Ehrlich
401 - 3rd Street, N. W.
Washington, D. C. 20001
Attorney for Petitioner Tynan

Charles B. Murray
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorney for Petitioners Hanrahan and Shea

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,038

GENE Z. HANRAHAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,040

WILLIAM T. P. SHEA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,041

JOHN W. TYNAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 24, 1965

Mr. Monroe H. Freedman (appointed by this court) for appellants in Nos. 18,038 and 18,040, argued for all appellants. *Mr. Charles W. Halleck* (appointed by this court) was on the brief for appellant in No. 18,041.

Mr. Donald S. Smith, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Frank Q. Nebeker, John A. Terry* and *Miss Barbara A. Lindemann,* Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and WASHINGTON and WRIGHT, *Circuit Judges.*

WRIGHT, *Circuit Judge*: On July 22, 1959, in Puerto Rico, three District of Columbia residents were indicted for fraudulent use of the mail.[1] The indictment alleged sixty-five mailings, all to Puerto Rican citizens, pursuant to a fraudulent scheme whose operations centered in the

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[1] Fraudulent use of the mail is prohibited under 18 U.S.C. § 1341, which provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both."

District of Columbia and whose alleged victims resided in several parts of the United States. On arraignment in Puerto Rico on July 29, 1959, appellants Hanrahan and Shea moved unsuccessfully for a speedy trial. The trial was eventually set for November 16, 1959. On October 28, 1959, however, appellants moved for a change of venue on grounds that prejudicial pre-trial publicity against them in Puerto Rico made it impossible for them to obtain a fair trial in that jurisdiction[2] and that a trial in Puerto Rico would place appellants at a serious disadvantage in defending themselves.[3]

The change of venue was granted on May 24, 1960. On August 5, 1960, appellants were arraigned in the United States District Court for the District of Columbia. At that time the Government requested a delay in trial until January, 1961. In view of appellants' urging their constitutional rights to a speedy trial, however, the court set the trial for October 10, 1960. On September 14, 1960, the Government again requested a trial delay, and counsel for appellants once again pressed for a speedy trial. In continuing the case to November 1, 1960, the court stated:

> "This will give the government a month and a half to prepare and I certainly feel that the preparation

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[2] As exhibits accompanying the motion appellants filed 17 newspaper articles telling how Puerto Rican businessmen were being swindled by American operators.

While this motion for change of venue was pending, appellants made two motions for continuance.

[3] Since the letters were allegedly mailed in the District of Columbia, venue lay in this district as well as in Puerto Rico. *Hagner* v. *United States*, 285 U.S. 427 (1932). It has even been held that the prosecution for mail fraud may be brought in any district through which the mail passes on its way to its destination. *United States* v. *Duma*, S.D.N.Y., 228 F.Supp. 755 (1964).

which was done in Puerto Rico before the indictment was returned should not be wasted.

* * * * * *

"I feel that I must do this. They are requiring and demanding a speedy trial and they are entitled to that under the Constitution and I am fearful that if I do not grant it, there would be perhaps something said about it in the Court of Appeals, which would not be favorable to the government."

In spite of the court's expressed concern for the appellants' right to a speedy trial, the Government, on October 7, 1960, before a different judge, requested a further continuance on the representation of the Government that "the Government intends to dismiss the present indictment" and "to re-present the matter to a Grand Jury" in about six weeks. Appellants opposed the motion for a continuance and reasserted their right to a speedy trial. The Government's motion for a continuance without date was granted, however, and seventy-six weeks thereafter, on March 26, 1962, a new indictment, presenting the same mail fraud scheme during the same time but with different mailings, was returned by the grand jury in the District of Columbia. On April 27, 1962, appellants moved unsuccessfully for dismissal of the indictment for lack of a speedy trial.

During the trial of the case itself, which finally began on January 14, 1963, the appellants formally renewed their motion for dismissal for lack of a speedy trial. It was apparent during the trial that so much time had elapsed since the events in suit that some of the witnesses were unable to recall them or to produce records concerning them. One witness testified: "It has been so long I can hardly remember." Another witness, on a single page of transcript, testified: "* * * to the best of my recollection * * * I believe it was * * * if I recall * * * I don't recall." Defense records were lost or destroyed, and the Government on several occasions during the trial obliquely

suggested to the jury that the appellants themselves had lost or destroyed them. Co-defendant Burke suffered a breakdown late in the trial, requiring a mistrial as to him. The indictment as to Burke was later dismissed for delay in the prosecution, the trial judge noting that Burke's breakdown had occurred during "the strain of a protracted trial after a prolonged delay since first being indicted." *United States* v. *Burke,* D.D.C., 224 F.Supp. 41, 47 (1963).

In sum, appellants were finally convicted on April 19, 1963, five years after commencement of the crime of which they were accused and almost four years after they were first charged with the offense—this delay in spite of repeated and persistent attempts to obtain a speedy trial and dismissal of the prosecution for want thereof.

The Government makes no real effort to justify the delay caused by bringing the first indictment in Puerto Rico. It would have this court ignore that delay and consider only the time which elapsed from the return of the second indictment to trial in determining the issue of speedy trial.[4] The District Court, in denying appellants' motion for dismissal, acknowledged that "there would appear to be support" for appellants' motion to dismiss if the second indictment had charged the same offense as the first, but held that "the fact is that the second indictment in this case, while alleging substantially the same scheme to defraud, charges in its various counts violations of law entirely different from those charged in the first indictment."[5] We find that this action of the District Court exalts form over substance.

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[4] On appeal the Government argues that "nothing that happened before March 26, 1962, the date the indictment *in this case* was returned, is of any significance whatever [in assessing appellants' claimed denial of speedy trial]." (Emphasis in the Government's brief.)

[5] This quote is taken from a memorandum filed by Judge

Rule 48(b), FED. R. CRIM. P., if not the Sixth Amendment, in terms requires the prosecutor to proceed without "unnecessary delay." The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun.[6] *Nickens* v. *United States*, 116 U.S.App.D.C. 338, 323 F.2d 808 (1963), *cert. denied*, 379 U.S. 905 (1964), does not hold otherwise, if indeed it could in the face of the language of Rule 48(b).[7] Therefore, the critical question in this case is,

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Pine, who heard and denied the pre-trial motion for dismissal made by appellants on April 27, 1962. When the motion for dismissal was renewed at the end of the trial, the trial judge, Judge Sirica, denied it, stating:

> "Well, I am not going to overrule Judge Pine, and I feel this way about it: The matter has been heard, it is in the record, and the objection is preserved, and from what I have seen, I don't think that you were denied a speedy trial, from what I have heard of this case."

Thus it can be presumed that the trial judge concurred in the grounds relied on for denial by the judge who heard the pre-trial motion.

[6] *Smith* v. *United States*, 360 U.S. 1, 10 (1959); *Hoopengarner* v. *United States*, 6 Cir., 270 F.2d 465, 469 (1959); *Kirkwood* v. *Harris*, W.D.Mo., 229 F.Supp. 904 (1964); *United States* v. *Palermo*, S.D.N.Y., 27 F.R.D. 393 (1961); *United States* v. *Barnes*, S.D.Cal., 175 F.Supp. 60 (1959); and *cf. D'Aquino* v. *United States*, 9 Cir., 203 F.2d 390, 391 (1951), *cert. denied*, 343 U.S. 935 (1952). In some cases the formal prosecution may begin with the indictment or information. But in others, the prosecution may begin with the filing of a complaint. See Rule 3, FED. R. CRIM. P.; *United States* v. *Palermo*, *supra*.

[7] The rule states: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant *who has been held to answer to the district court* * * * the court may dismiss the indictment, information or complaint." (Emphasis added.)

The majority in *Nickens* stated its holding as follows:

> "Appellant's claim relating to the delay between the

not when was the indictment filed, but when was the prosecution commenced.

The mail fraud charges brought here involve two essential elements: (1) a scheme to defraud, and (2) use of the mail in furtherance of the said scheme. Where one scheme involves several mailings, the law is settled that each mailing constitutes a violation of the statute. See *Badders* v. *United States,* 240 U.S. 391 (1916). But what is not clear is whether, in appraising appellants' claimed denial of speedy trial in this case, successive indictments alleging the same scheme but different mailings should be looked upon as two separate prosecutions or as mere parts of one continuing prosecution. We think that the purposes behind the speedy trial provisions contained in Rule 48(b) and in the Sixth Amendment require that the facts in this case be considered as one continuing prosecution.

In curtailing the length of criminal prosecutions, the law recognizes certain interests of the person accused and attempts to protect those interests. Speedy trial provisions seek, first, to prevent lengthy pre-trial imprisonment where the accused is unable to make bail, or pre-trial restriction of movement when bail is available.[8] Second, and perhaps equally important, these provisions seek

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date of the offense and the *commencement of criminal prosecution* is not covered by Rule 48(b) of the Federal Rules of Criminal Procedure [citing cases], or by the Sixth Amendment * * *." 116 U.S.App.D.C. at 339, 323 F.2d at 809. (Emphasis added.)

[8] See *Petition of Provoo,* D.Md., 17 F.R.D. 183, 198, *affirmed per curiam,* 350 U.S. 857 (1955); *United States* v. *McWilliams,* D.D.C., 69 F.Supp. 812, 814-815 (1946), *affirmed,* 82 U.S.App.D.C. 259, 163 F.2d 695 (1947); *Frankel* v. *Woodrough,* 8 Cir., 7 F.2d 796, 798-799 (1925). And see 108 U. PA. L. REV. 414, 417 n.18 (1960); *Note,* 57 COLUM. L. REV. 846 (1957).

to minimize the anxiety and attendant evils which are invariably visited upon one under public accusation but not tried.[9] Finally, they seek to insure that the ability of the accused person to answer the charge will not be impaired on account of lost witnesses and faded memories due to the passage of time.[10] In this case, these protected interests were threatened by a public accusation of mail fraud which went unresolved for close to four years. The fact that the second indictment involved thirty incidents of mail usage which differed from the sixty-five originally alleged did not mitigate this threat. The purposes underlying the speedy trial provisions would be hopelessly frustrated if the prosecutor in a mail fraud case could evade his responsibility to prosecute with reasonable diligence by merely substituting for mailings originally alleged other mailings, not alleged, but nevertheless made in furtherance of the same scheme.

From the fact alone that the entire period, beginning with the Puerto Rican indictment, must be considered, however, it does not automatically follow that appellants have been denied a speedy trial under the Sixth Amendment, or that there has been unnecessary delay under Rule 48(b). These determinations require analysis of the reasons for the lengthy prosecution and evaluation of those reasons. In some cases, where the delay is uncommonly long and, therefore, the likelihood of prejudice quite high, the reason for the delay may be of little significance.[11] In

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[9] *Ibid.*

[10] *Ibid.*

[11] The classic example of a case in which the delay was so long that, whatever its reason, it required dismissal is *United States* v. *Chase*, N.D.Ill., 135 F.Supp. 230 (1955), where the accused had not been tried for 20 years after his indictment for murder. In dismissing the prosecution, the judge understandably made no mention of the reason for the delay.

this case, however, an analysis of the reasons must be made. The complexity of the alleged scheme and the number of witnesses needed to prove the charges indicate that a considerable time for preparation may have been justifiable. Moreover, after transfer to the District of Columbia it is reasonable to assume that some time was needed by the Government to make the changes necessitated by the new trial setting.

Two questions, however, arise from this record which went unanswered in the trial court because of the court's failure to consider the time preceding the second indictment. First, did the prosecutor exercise reasonable diligence in seeking the second indictment? At the time Government counsel announced his intention to dismiss the Puerto Rican indictment in favor of a new indictment, he estimated that the process would take about six weeks. The actual time elapsing from the date of that estimate to the return of the second indictment proved to be seventy-six weeks[12]—roughly twelve times the original estimate. This disparity demands explanation.

Even if satisfactory explanation is forthcoming, however, a second question remains. It is highly probable that the prosecution of this case would have been shortened by as much as two years if the original indictment had been brought in the District of Columbia,[13] where appellants lived and where the offense centered, instead of in Puerto Rico. Moreover, it is arguable that reasonable regard for the interests of the accused might have compelled the Government to anticipate that appellants

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[12] There is testimony in the record that as much as ten months of this time elapsed with no postal inspector assigned to the case.

[13] See *United States* v. *Burke*, *supra*, 224 F.Supp. at 47 (dismissal of indictment as to one of the co-defendants of appellants in this case).

could not be speedily and fairly tried in a distant place where many of the people spoke no English and where adverse feeling against outsiders charged with defrauding local businessmen was certain to have some effect. Discretion existed in law, it is true, to bring the original prosecution in either the District of Columbia or Puerto Rico. But why was that discretion exercised by bringing the prosecution in Puerto Rico? If the decision to prosecute in Puerto Rico rather than in the District of Columbia was a deliberate choice made for a supposed advantage,[14] then the delay directly resulting from that choice must be considered in appraising appellants' speedy trial claim.

The record in this case, voluminous as it is, is not sufficient to enable us to resolve the questions raised by appellants' denial of speedy trial claim, nor should we decide them in the first instance on appeal. Therefore, the case must be remanded for further proceedings. If the court should find that all the delay attributable to the prosecutor was necessary for fair and just prosecution of the charge of mail fraud, then the convictions will stand. If, on the other hand, the court should find that the prosecution was conducted with such disregard of appellants' interests that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show "that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay,"[15] then appellants' Sixth Amendment rights have been denied and the convictions must be vacated and the indictments

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[14] See *United States* v. *Barnes, supra* Note 6, 175 F.Supp. at 64; *cf. Pollard* v. *United States*, 352 U.S. 354, 361-362 (1957); *Petition of Provoo, supra* Note 8, 17 F.R.D. at 201.

[15] *Williams* v. *United States*, 102 U.S.App.D.C. 51, 53, 250 F.2d 19, 21 (1957) (opinion of Judge Bazelon).

dismissed.[16] Finally, if no constitutional violation is found, but unnecessary delay under Rule 48(b) is present,[17] then the decision whether to vacate and dismiss lies within the sound discretion of the trial court. In exercising that discretion the court should consider the prejudice resulting from possible loss of evidence[18] as well as the hardships appellants might have suffered by reason of the delay in the prosecution.[19]

We have examined the other point raised on this appeal and found it to be without merit.

Remanded for further proceedings.

WILBUR K. MILLER, *Circuit Judge,* dissents. He would affirm the judgments herein.

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[16] The Sixth Amendment prohibition encompasses more, of course, than delays caused by the misconduct or negligence of the prosecutor. Extraordinary delays due to inefficient court administration have raised constitutional problems in the past. See *King* v. *United States,* 105 U.S.App. D.C. 193, 265 F.2d 567 (*en banc*), *cert. denied,* 359 U.S. 998 (1959). But no such extraordinary delay appears in the record of this case.

Also, when extreme prejudice has been shown to result from the delay, the cause of the delay may be immaterial. See Note 11 *supra.*

[17] Compare *Mann* v. *United States,* 113 U.S.App.D.C. 27, 304 F.2d 394, *cert. denied,* 371 U.S. 896 (1962).

[18] Appellants cite several instances during the trial where witnesses could not remember a specific event, and one instance where documentary evidence had been destroyed.

[19] Appellants claimed, among other things, substantial loss of income. A co-defendant, whose case was dismissed for delay, suffered a nervous breakdown during the prosecution. See *United States* v. *Burke, supra.*

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,335

JOHN W. TYNAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,394

GENE Z. HANRAHAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,395

WILLIAM T. P. SHEA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeals from the United States District Court for the District of Columbia

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Decided April 5, 1967

Mr. Myron G. Ehrlich (appointed by this court) for appellant in No. 20,335.

Mr. Charles B. Murray for appellants in Nos. 20,394 and 20,395.

Mr. Donald S. Smith, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, *Frank Q. Nebeker* and *Charles A. Mays,* Assistant United States Attorneys, were on the brief, for appellee.

Before FAHY, McGOWAN and TAMM, *Circuit Judges.*

TAMM, *Circuit Judge:* These cases were before us in an earlier appeal, *Hanrahan, et al* v. *United States,* 121 U.S. App. D.C. 134, 348 F.2d 363 (1965), wherein the factual background of the cases is set forth.

The appellants have been found guilty by a jury of multiple counts of an indictment charging mail fraud. After argument of the earlier appeal, we, speaking through a divided panel, remanded the case to the District Court in order to augment the then record sufficiently "to enable us to resolve the questions raised by appellants' denial of speedy trial claim." We directed that:

> "If the court should find that all the delay attributable to the prosecution was necessary for fair and just prosecution of the charge of mail fraud then the convictions will stand. If, on the other hand, the court should find that the prosecution was conducted with such disregard of appellants' interests that it can be said that the delay resulted from the deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay' then appellants' Sixth Amendment rights have been denied and the convictions must be vacated and the indictments dismissed."

348 F.2d 363, 368 (footnotes omitted).

As a result of our remand, District Court Judge John

J. Sirica, who was the judge who presided at the original trial of these appellants, heard the testimony of a number of witnesses, accepted in evidence a number of exhibits, and upon the completion of hearings spanning a total of eighteen court days, rendered a careful and detailed opinion upon the evidence produced before him and the arguments of counsel. *United States* v. *Hanrahan,* 255 F. Supp. 957 (D.D.C. 1966). The evidence and arguments were extensive. The transcript of the hearings on remand totals some 1300 pages. Judge Sirica's 28-page opinion finds that "the defendants have not been deprived of their Sixth Amendment right to a speedy trial. Furthermore, the court is of the opinion that no unnecessary delay under rule 48(b), [Fed.R.Crim.P.] is present which would require the court, in the exercise of its discretion, to dismiss the indictment." 255 F.Supp at 971. Included in Judge Sirica's opinion is his finding that *"on the whole record in this case and taking into consideration all of the circumstances the Government has demonstrated that the defendants suffered no serious prejudices as a result of the delays which did not ensue from the ordinary and inevitable delay."* 255 F.Supp at 971. (Emphasis supplied.)

We have carefully considered this case. Outside the context of the Sixth Amendment, our concern for the problems confronting defendants' attempt to refute charges long delayed in prosecution has been expressed in *Ross* v. *United States,* 121 U.S. App. D.C. 233, 349 F.2d 210 (1965), and we have enlarged and elaborated our views in several subsequent cases, including *Daniels* v. *United States,* 123 U.S. App. D.C. 127, 357 F.2d 587 (1966); *Powell* v. *United States,* 122 U.S. App. D.C. 229, 352 F.2d 705 (1965); and *Jackson* v. *United States,* 122 U.S. App. D.C. 124, 351 F.2d 821 (1965). We recognize, however, that there are real and substantial differences between the problems of proof in the defense of a narcotics prosecution and those involved

in defending against a mail fraud indictment and that these differences are inherently and vitally related to the possibility of prejudice resulting from delay in prosecution. The narcotics prosecutions which have caused our concern in *Ross* v. *United States, supra,* and the dozen or more later opinions, rely fundamentally upon an identification of a defendant as a result of a single brief contact by a Government witness who, in a relatively short period of time, has participated in a substantial number of virtually identical transactions. Confining our distinction from the Ross-type case only to the facts in the present case, we observe that the nature of the Government's proof in support of the several counts of the indictment is not of the nature that is blurred, obscured, dissipated or destroyed by the passage of the period of time involved in this case. The transactions involving individual witnesses are generally unique in their experience, and where documentary evidence is accepted, it, by its very nature, retains its reliability.

In reviewing the record now before us, we do so with the admonition of *(Johnny Ray) Smith* v. *United States,* 360 U. S. 1 (1959), that "while justice should be administered with dispatch the essential ingredient is orderly expedition and not mere speed." Recognizing this mandate, we said in *(Raymond) Smith* v. *United States,* 118 U.S. App. D.C. 38, 41, 331 F.2d 784, 787 (1964):

> "The balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful, oppressive or vexatious." (Citations omitted)

The appellants, in their effort to show prejudice to themselves as a result of the delay in reaching trial, argue that they were deprived of substantial evidence and witnesses because of the destruction by water of certain of their files stored in the house of one of the defendants in

Pennsylvania. Judge Sirica treats of this factual situation in his opinion but points out that while this accident occurred in March or April of 1960, no effort was made by the defendant Shea to salvage or rehabilitate these records until October, 1960. This, incidentally, was during the period when the earlier indictment was pending in Puerto Rico. While concluding that the destruction of the defendants' records was an act of God, augmented by the carelessness of the defendants, Judge Sirica found that during the pendency of the second indictment the defendants:

> "had available to them the names of several hundred potential witnesses * * * including over 400 persons representing more than 400 business firms who were clients of the defendants in the continental United States, 124 persons who were clients of the defendants in Puerto Rico and the Virgin Islands, 206 persons and firms who were lenders with whom the defendants had contacts, and 29 former employees of the defendants' corporation."

He points out in his opinion that the names of all potential witnesses were found in the corporate records produced by the defendants, that the addresses of all potential witnesses were forwarded to the defendants' attorneys by the prosecutor during trial in all instances where specific requests were made, and that the names and addresses of 28 potential witnesses who were living in the continental United States were listed in a defendant's motion for change of venue from Puerto Rico to the continental United States. Incidentally, none of these persons were called as defense witnesses during the trial of the case. Other details of non-called potential defense witnesses are set forth in Judge Sirica's opinion in the discussion of Government exhibit 186. We conclude upon this aspect of the present appeal that the evidence is overwhelming in support of the Government's position that no prejudice chargeable to the Government resulted to

the appellants from the destruction of some of their records.

Upon the entire record measured by the mandate of this court fashioning the issues to be heard on remand we conclude that the findings and rulings of Judge Sirica are amply supported by substantial evidence, and require affirmance.

One further point is raised by at least two of the appellants in their present appeal. Appellants Hanrahan and Shea filed affidavits of prejudice against Judge Sirica, charging personal bias and prejudice under § 144, Title 28 U.S.C. By these affidavits, these appellants sought to disqualify Judge Sirica from presiding at the remand hearing because of bias allegedly revealed at or during the original trial of the case. Judge Sirica struck the affidavits of prejudice and accompanying certificates of counsel upon the ground of their legal insufficiency and, as heretofore indicated, conducted the remand hearing. We earlier denied appellant's petitions for "mandamus" upon this point. Appellant Tynan did not file an affidavit of prejudice against Judge Sirica but, of course, in this court takes the position that since no distinction may be made among the three appellants, any prejudice towards other appellants would be equally legally obnoxious to him.

The affidavits of prejudice filed by Hanrahan and Shea enumerate several specific allegations as the basis for the demand that the judge recuse himself. Each of the allegations related to some action taken or statement made by Judge Sirica during the course of the trial proceedings. To properly evaluate the affidavits we, of course, must rely upon the statutory provisions which are as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and *sufficient* affidavit that the judge before whom the matter is pending has a *personal* bias or prejudice either against him

> or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings. (Emphasis supplied)
>
> "The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. § 144.

It is well established that when presented with an affidavit of prejudice, the judge may not pass upon the truth or falsity of the allegations contained therein but must accept them as true for the purposes of passing upon the legal sufficiency of the affidavits. *Berger* v. *United States,* 255 U.S. 22 (1921); *Ex Parte American Steel Barrel Co.,* 230 U.S. 35 (1913). If the statutory standards are met, the judge must recuse himself, even if the allegations are known by the judge to be false. *Morse* v. *Lewis,* 54 F.2d 1027 (4th Cir. 1932), *cert. denied* 286 U.S. 557. On the other hand, if the statutory requirements are not met, it is the duty of the judge to refuse to disqualify himself. *Simmons* v. *United States,* 302 F.2d 71 (3rd Cir. 1962). Applying these standards to the specific provisions of the quoted statute, we observe that the basis for disqualification is *personal* bias or prejudice which precludes the judge from impartially exercising his judicial responsibilities in a particular case. It is to be noted that a distinction is to be drawn "between a judicial determination derived from evidence and lengthy proceedings before the court and *a determination not so founded upon facts brought forth in court* but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom." *In Re Federal Facilities Realty Trust Co.,* 140 F. Supp. 522 (N.D.Ill 1956) (emphasis added).

Reviewing the appellants' affidavits, we note again that they allege as factual basis for charges of prejudice only acts and conduct occurring in the courtroom during the trial of the present case or in relation to the court's official action in ruling upon issues and questions of conduct which were a part of the court proceedings in this case. However:

> "It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge solely on the basis of a bias or state of mind, (255 U.S. 42) [Berger v. United States] against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." *Craven* v. *United States,* 22 F.2d 605, 605 (1st Cir. 1927).

More succinctly stated, in order to be disqualifying the Supreme Court has construed the statute to establish that:

> "The alleged bias or prejudice to be disqualifying *must stem* from *an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.*" (Emphasis supplied.) *United States* v. *Grinnel Corp.,* 384 U.S. 563, 583 (1966).

It is perfectly obvious that of the asserted bias of Judge Sirica, none originated in any extrajudicial source, consequently we affirm the judge's action in refusing to recuse himself in these proceedings.

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In Re Union Leader Corp.,* 292 F.2d 381, 391 (1st Cir. 1961).

Affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff

v.

GENE Z. HANRAHAN,
WILLIAM T. P. SHEA and
JOHN W. TYNAN,
Defendants

Criminal No. 269-62

OPINION

The defendants herein were convicted by a jury of violations of the federal mail fraud statute,[1] and were sentenced to a term of imprisonment of from twenty months to five years. From that judgment they appealed. The United States Court of Appeals for the District of Columbia Circuit remanded the cause for a hearing to determine certain matters relating to the defendants' right to a speedy trial as guaranteed by the Sixth Amendment, and as to whether unnecessary delay in bringing the prosecution against the defendants requires a dismissal of the case under Rule 48(b).[2] *Hanrahan v. United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965).

The defendants were first indicted in the United States District Court for the District of Puerto Rico. The indictment charged these defendants and seven other persons in sixty-five counts with fraudulent mailings to Puerto Rican citizens pursuant to a scheme to defraud. Three months

[1] 18 U.S.C. § 1341.

[2] Fed. R. Crim. P. 48(b).

after the indictment was returned, the defendants filed a motion for change of venue, alleging that prejudicial pretrial publicity made a fair trial in Puerto Rico impossible, and that most of their witnesses lived in the continental United States and that the defendants were without funds to bring these witnesses to Puerto Rico for trial. Some months later, this motion was granted and the case was transferred to the United States District Court for the District of Columbia. Subsequently, the United States indicated to the Court that it intended to dismiss the Puerto Rican indictment and to seek a new indictment before a grand jury in the District of Columbia. Between this announcement and the return of the indictment under which the defendants were convicted, some seventeen months elapsed.

The hearing on remand was held by this Court commencing on March 4, 1966, and continued from time to time until May 20, 1966. The defendants were present at the hearing, and along with the United States, were represented by able and experienced counsel. This hearing was directed at seeking answers to two questions which the Court of Appeals found unanswered by the voluminous trial record: (1) Did the prosecutor exercise reasonable diligence in seeking the second indictment; and (2) Since the mailings took place in the District of Columbia, and the scheme was centered there, why was the prosecutor's discretion exercised in first bringing the case in Puerto Rico instead of the District of Columbia? Testimony of five witnesses totalling approximately twelve hundred typed pages, plus affidavits and documents were presented to the Court along with citations to the original trial record and proposed findings of fact and conclusions of law.

I. The Puerto Rican Case

On or about February 12, 1959, Postal Inspector Stohlberg visited Mr. Francisco A. Gil, Jr., United States Attorney for the District of Puerto Rico, and brought to his attention numerous complaints concerning the activities of the Commer-

cial Finance Service Corporation in Puerto Rico. Mr. Gil was, at that time, familiar with a circular issued from the Office of the Attorney General of the United States dealing with the so-called advance fee racket, and after examining the evidence presented to him by Inspector Stohlberg, he determined that Title 18, U.S.C. § 1341 had been, and was being, violated by agents of the Commercial Finance Service Corporation. He further determined that the victims of these offenses were what he considered poor persons. For these reasons, he authorized the filing of a complaint and the issuance of arrest warrants. The complaint was filed on February 13, 1959, with the United States Commissioner for the District of Puerto Rico, charging the defendant Shea and six other persons not now before the Court, with violations of 18 U.S.C. § 1341. The warrant for the arrest of defendant Shea was never executed and was returned to the United States Commissioner.

The United States Attorney in Puerto Rico received the final report from the Postal Inspector about six weeks following the arrests of agents of the Commercial Finance Service Corporation in Puerto Rico. On June 30, 1959, the defendants filed a motion to dismiss the Commissioner's proceedings against them. One of the grounds therefor was an alleged denial of a speedy trial, although the motion was unsupported by any factual allegations or citation of authority. Subsequently, on July 22, 1959, and although defendants' counsel had expressed a desire to waive indictment and proceed by way of information, an indictment was returned in the United States District Court for the District of Puerto which charged these defendants and others in sixty-five counts with violations of the mail fraud statute. This matter had been presented to the grand jury by the United States Attorney in approximately one day. All of the counts of the Puerto Rican indictment charged violations which were within the applicable statute of limitations.[3] None of the present defendants had been arrested up to the date of the

[3] 18 U.S.C. § 3282.

return of the indictment. On July 28, 1959, defendants Hanrahan and Shea surrendered themselves in the United States District Court for the District of Puerto Rico and were enlarged upon bond the same day. They were arraigned the following day and entered pleas of not guilty. Defendant Tynan was arrested in the State of Maryland on July 28, 1959, and was released on bond the same day. Defendant Tynan was never arraigned during the pendency of the case in Puerto Rico. At their arraignment, counsel for Hanrahan and Shea moved for a trial as soon as possible. The Court declined to grant the motion on the ground that it could not set a trial date until all of the defendants were produced and arraigned.

On August 28, 1959, the defendants, through counsel, filed a motion for a bill of particulars. The bill of particulars was filed by the government on October 13, 1959. On September 21, 1959, the case was scheduled for trial on November 16, 1959. However, on October 28, 1959, the defendants filed a motion for a change of venue, and on November 3, they also moved for a continuance of the trial date, alleging that the case was complicated and that they would be unable to prepare it for trial within such a short period. The motion was granted on November 4, 1959, and the trial date was continued until March 28, 1960. There is no indication that the defendants, or the government, sought a hearing on the defendants' motion for change of venue. On November 6, 1959, the Court entered an order continuing the hearing on this motion until further order. On February 10, 1960, the defendants filed their second motion for a continuance, requesting a delay until June, 1960. The grounds for this motion were that counsel would not be available until May; that the defendants were as yet still unprepared; and that they would be in a better position to defray expenses if the trial was held in the summer months. On March 14, 1960, this motion for a continuance was granted, and the trial was set for June 6, 1960. On May 2, 1960, the Court entered an order setting the pending motions, including the motion for a change of venue, for a hearing on May 12, 1960. On

May 9, 1960, the defendants moved for a further continuance of the trial date on the ground that their attorney would necessarily be in the continental United States until the end of June, 1960. The United States filed a formal opposition on the following day.

On May 12, 1960, a hearing was held on the defendants' motion for a change of venue. The Court noted that the defendants would undoubtedly be subject to some local prejudice in Puerto Rico, indicating that it did not know whether the passage of time from the publication of the newspaper articles would have allowed their influence to subside or disappear. The Court, observing that the newspaper articles brought out the contentions of both the prosecution and the defense, as to the legitimacy of the business that had been conducted, took the defendants' motion under advisement. On May 24, 1960, an order was entered granting the defendants' motion for change of venue. As the basis for its ruling, the Court mentioned the newspaper publicity which had taken place about the time of the defendants' arrest in Puerto Rico, and also noted that the majority of the jurors would probably be occupied in trades, businesses, etc., similar to those of the alleged victims. The Court also recognized the defendants' precarious financial condition and the fact that most of the witnesses they intended to call lived or had their offices in Washington, D.C., in the vicinity of Washington, D.C., or elsewhere on the mainland.

It is the defendants' contention that the prosecution in Puerto Rico was under the direction and control of the Department of Justice and that the case was brought in that District in order to take advantage of the situation which existed there, and to put the defendants at a disadvantage in the presentation of their defense.

The exhibits and testimony indicate that there was considerable correspondence between the United States Attorney in Puerto Rico and the Department of Justice. In addition, Mr. Gil testified that he participated in eight or ten conferences, including telephonic communication, with the Depart-

ment concerning the case. On May 28, 1959, the Department informed Mr. Gil that they were concerned that there be no more delays before presenting the case to the grand jury, and offered their assistance to him. On the following day, Mr. Gil called the Department of Justice and indicated that because of his crowded work schedule, he would welcome assistance in preparing the indictment. Subsequently, sample indictments were furnished by the Department, and Mr. Gil was requested to forward by air mail a copy of the indictment he would use. Upon receipt of this indictment, the Department indicated to Mr. Gil that it had doubts about portions of it, but before a revised copy could be prepared by the Department, the indictment was filed in Puerto Rico. In addition to cooperation in the preparation of the indictment, there was correspondence between the United States Attorney and the Department of Justice regarding the defendants' desire to waive indictment; opposition to the motion for change of venue and other offers of assistance.

It is apparent to the Court that the Department of Justice was interested in the prosecution of mail fraud schemes in general, and in this case in particular, in conjunction with the Attorney General's program to eradicate consumer frauds. However, the United States Attorney for the District of Puerto Rico had the authority to initiate prosecutions for violations of federal statutes which were taking place in Puerto Rico, and at no time prior to his authorizing the filing of the complaint and the issuance of the arrest warrants in this case, did Mr. Gil consult with any official of the Department of Justice. Furthermore, although the Post Office Department was conducting an investigation of the defendants and their activities in the continental United States prior to the time the defendants began their operations in Puerto Rico, it is apparent that Mr. Gil did not learn of this investigation until immediately before he presented his case to the Puerto Rican grand jury, and that at that time the investigation of continental cases had not been completed. It is the Court's conclusion, based on the foregoing, and upon the whole record of this case, that the decision to bring the

prosecution in the United States District Court for the District of Puerto Rico was an independent judgment by the United States Attorney, and that in so deciding, he was not controlled by the dictates of the Department of Justice.

The further question remains: Why did the prosecutor choose to bring the action in Puerto Rico? As indicated, it is the defendants' position that this was done to take advantage of supposed local prejudice and to place the defendants at a disadvantage, that is, that the decision was a deliberate choice made for a supposed advantage. The Court does not feel that this inference can be drawn from the evidence. On or about February 13, 1959, the agents of Commercial Finance Service Corporation operating in Puerto Rico had already collected more than $20,000 pursuant to their activities. It was apparent that a federal statute had been, and was then being, violated and that the residents of the district were being victimized. Furthermore, the continental investigation, of which the prosecutor later became aware, had not yet been completed, while the investigation of Puerto Rican cases was completed within two months after the warrants were issued. It is reasonable to assume that when he did become aware of this investigation he felt that a trial on the Puerto Rican charges would be more feasible under the circumstances, than waiting for the completion of the investigation in the continental United States. Furthermore, as subsequent events would indicate, a trial in Puerto Rico on the Puerto Rican charges would possibly have taken place prior to a trial in the District of Columbia on the same charges. In the last analysis, it appears to this Court that the prosecutor felt that it was his duty to stop a continuing offense whereby residents of his district were being victimized. There is no indication that this decision was reached in utter disregard for the defendants' rights. In the opinion of this Court, the prosecutor would have been derelict in his duty if he had not moved swiftly, as he did.

For the foregoing reasons and on the basis of the entire record in this case, the Court is of the opinion that the exercise of discretion in bringing the prosecution in Puerto Rico

was proper, and that it was not a deliberate choice made for a supposed advantage.

II. The Prosecution in the District of Columbia

The pleadings, bonds and photostatic copies of docket entries were transmitted from the Clerk of the United States District Court for the District of Puerto Rico on June 1, 1960, and arrived in the office of the Clerk of the United States District Court for the District of Columbia on June 3, 1960. The United States Attorney for the District of Columbia was notified of the transfer of the case on June 14, 1960, and on June 23, 1960, the matter, designated Criminal Case No. 510-60, was assigned to Assistant United States Attorney Harry T. Alexander, by the Chief of the Criminal Division of the United States Attorney's Office. On June 28, 1960, Mr. Philip F. Herrick entered his appearance as attorney for the instant defendants and four others. On July 1, 1960, several defendants, other than the present ones, filed a motion to continue arraignment until the first day of trial. On July 6, 1960, Mr. Alexander filed an opposition to this motion indicating that the presence of all defendants before the Court would enable the Court to fix a trial date agreeable to all and eliminate further requests for a continuance. On July 5, 1960, the defendants' motion was denied and the Court ordered that the arraignment of defendant Tynan, and four co-defendants who had not been previously arraigned in Puerto Rico, be set for August 5, 1960.

At the arraignment, the government requested that the trial be set for some time in January, 1961. The defendants opposed this, urging their Constitutional right to a speedy trial. The Court tentatively set the case down for trial on October 10, 1960. On August 12, 1960, the government moved again to have the case set for trial in January, 1961, and in their opposition, the defendants again demanded a speedy trial. These demands for a speedy trial are interesting, especially in view of the fact that at least until February

10, 1960, the defendant were not prepared for trial in Puerto Rico, and that they were unable to go to trial there as late as June, 1960, although upon arraignment in Puerto Rico on July 29, 1959, they had demanded a trial as soon as possible. During the pendency of the case in Puerto Rico, the United States Attorney made no motions for a continuance of the trial and was responsible for none of the delay between the return of the indictment and the change of venue.

Upon the request of the Department of Justice, the United States Attorney's office files were transferred from Puerto Rico to Washington, D. C. on July 23, 1960. The exhibits pertaining to the case were received by Assistant United States Attorney Alexander on August 3, 1960. On July 1, 1960, Mr. Alexander discussed the case with officials from the Department of Justice. At this time, he raised the question of certain "mechanical problems", originally suggested by defense counsel, which might make it difficult to bring the Puerto Rican case to trial in the District of Columbia. At the time, however, these problems did not appear insurmountable. It was Mr. Alexander's opinion that the Puerto Rican case could have been tried in October, had one had time to develop it.

On September 14, 1960, the government's motion that the trial be scheduled for January of 1961, came on for hearing. The case was then set for trial on November 1, 1960, in view of the defendants' desire for a speedy trial. In so doing, the Court indicated that it felt that the preparation which was done in Puerto Rico should not be wasted. On the next day, the United States Attorney for the District of Columbia informed Mr. Gil of the Court's ruling, and also told him that the Court indicated that his office should cooperate in the presentation of this case.

During the month of September, 1960, it had become apparent to the United States Attorney for the District of Columbia, and to officials of the Department of Justice, that the trial of the Puerto Rican indictment in the District of Columbia would present great problems. These difficulties

were, for the most part, the "mechanical problems" suggested by defense counsel soon after the case was transferred, which at first blush did not appear insurmountable. These problems consisted mainly of the following: (1) many of the documents to be used as evidence at the trial were in the Spanish language; (2) many of the witnesses to be called by the government could not speak English; (3) extensive use of interpreters would be necessary in the preparation and trial of the case; (4) the witnesses in the Puerto Rican indictment were largely poor persons and sole proprietors of small businesses and to bring them to the District of Columbia for the trial would work an undue hardship upon them; (5) many of the witnesses in the Puerto Rican indictment did not possess clothes to withstand the rigors of the winter in the District of Columbia, during which time the case was scheduled to be tried; and (6) the lack of a Spanish speaking prosecutor in the District of Columbia. These matters, along with the Court's ruling on the trial date, were discussed by Mr. Alexander and officials of the Department of Justice on September 16, 1960. It appeared then, that because Mr. Gil had personally prepared and presented the case to the Puerto Rican grand jury, and in view of the small staff available to run his office, it would not be practicable to expect the Puerto Rican United States Attorney, or his office, to assist in the trial. Furthermore, it appeared that the use of interpreters would be most undesirable because of the nature of the scheme involved. After a full discussion, the best solution appeared to be the possibility first raised on July 1, 1960, that is, to obtain a new indictment with continental witnesses. On September 29, 1960, conferences were held at the Department of Justice and at the Office of the United States Attorney for the District of Columbia to discuss the necessity of obtaining a new indictment. Present at these conferences were the United States Attorney for the District of Columbia, the United States Attorney for Puerto Rico, Messrs. Connor, Kossack, Arenson, and Barry of the Department of Justice, Assistant United States Attorney Harry T. Alexander, and Postal Inspectors Burrows and

Callahan. It was decided that a new indictment would be sought thereby eliminating the language barrier and other difficulties inherent in attempting to prosecute the Puerto Rican indictment in the District of Columbia. The new indictment was to be based largely upon victims of the scheme residing within the continental United States. Postal Inspector Burrows indicated to Mr. Alexander that he had seventeen cases in the continental United States worked up and another one-hundred available. He was instructed to make a further investigation regarding continental victims. United States Attorney Gil was instructed to submit a report containing the names of Puerto Rican victims who spole sufficient English to testify in that language and who would not be inconvenienced in coming to the District of Columbia to testify at the trial. At this conference, it was agreed that no extensive investigation appeared to be necessary at that time, and that the bulk of the investigative work had already been done. It was also agreed that the indictment to be sought should be more manageable than the one returned in Puerto Rico, preferably having one-half the counts of the Puerto Rican indictment.

On October 6, 1960, the Chief of the Criminal Division of the United States Attorney's Office indicated to the Chief Judge of the United States District Court for the District of Columbia, in chambers, that the government intended to dismiss the Puerto Rican indictment. On the same date, Mr. Alexander went to Philadelphia to Interview defendant Silverman. This was the only time that Mr. Alexander interviewed any witness in the case. On October 7, when Mr. Alexander was out of town, the Chief of the Criminal Division announced in Court that the government intended to dismiss the Puerto Rican indictment and present the matter to a grand jury in the District of Columbia. He further advised the Court that it was "anticipate[d] it will take approximately six weeks to present this matter to a new grand jury, that is, to thoroughly investigate it and present it." Mr. Alexander had no knowledge that this estimate would be made nor did he authorize it to be made in his behalf. On

this date, the Chief of the Criminal Divison was not familiar with the extent of the operations of the defendants in the United States, the amount of documentary evidence, the number of witnesses necessary to prove the scheme to defraud, or the complexity of the case, but gave an estimate based upon prior experience of his office.

On October 7, 1960, the matter was continued until December 8, 1960. The defendants objected to the continuance, indicating their desire to proceed with the case. With the consent of the defendants, the indictments against them were not dismissed on October 7, in order that the bond from the Puerto Rican indictment could be transferred to the new indictment. Subsequently, the indictment was dismissed as to Shea and Tynan on February 1, 1961, and as to Hanrahan on June 15, 1961.

Some time prior to October 12, 1960, and unknown to Mr. Alexander, the Department of Justice urged Postal Inspector Burrows to expedite his re-investigation of the continental witnesses. The United States Attorney hoped to have Burrows' report, as well as Department of Justice recommendations, within two weeks of October 12, 1960. On October 27, 1960, Mr. Gil transmitted to the United States Attorney for the District of Columbia his report of Puerto Rican victims who could come to the District of Columbia and testify at the trial. On December 31, 1960, Postal Inspector Burrows retired from the Postal Inspection Service, and on January 7, 1961, the case was assigned to Postal Inspector Joseph P. Turner. On January 11, the Department of Justice inquired of Mr. Alexander as to the progress of the investigation looking to re-indictment. Mr. Alexander said that he was waiting to hear from Postal Inspector Burrows. On January 13, Mr. Alexander advised the Department that Mr. Burrows had retired and had been replaced by another Inspector. He also indicated that he expected to spend two days during that week conferring with the new Inspector. At the hearing, Mr. Alexander was unable to recall whether he met Mr. Turner, or where he met him, but during the week of January 16, 1961, Postal Inspector Turner

transmitted to Mr. Alexander the supplemental investigation regarding victims of the scheme residing in the continental limits of the United States.

From the period beginning May, 1960, and ending at the beginning of January, 1961, Mr. Alexander was carrying his normal heavy load of criminal cases, and at least between May and September, 1960, he substituted at trial, impromptu, for other Assistant United States Attorneys otherwise engaged or on sick leave. During January, February and March, 1961, the Chief of the Criminal Division was confronted with personnel problems in the operation of that Division. On January 29, 1961, Assistant United States Attorney Fred McIntyre resigned to accept appointment as Chief Counsel of a Committee of the United States Senate. During most of the period between February 3 and March 17, Assistant United States Attorney Harold Titus was absent on sick leave. Both of these men were senior trial attorneys in the Criminal Division and with their loss, it became necessary for the Chief of the Division to reassign their cases among the remaining personnel of the Criminal Divison. He determined that because of the loss of Mr. McIntyre and the illness of Mr. Titus, it was necessary that Assistant United States Attorney Alexander continue to prosecute criminal cases set for trial on the regular court calendar.

On March 13, when the matter came before the Court, the Chief of the Criminal Divison indicated that the delay in presenting the case to the grand jury was due to the fact that he could not spare Mr. Alexander from the general trial work at that time. On March 23, 1961, the Department of Justice asked Mr. Alexander to advise the Department of the posture of the case since some time had elapsed since the transfer from Puerto Rico. A week later, the United States Attorney informed the Department that Mr. Alexander had been unable to devote much time to the case due to the fact that he had been engaged in trials practically every court day, but it was expected that he would be in a position to start presentation of the case to the grand jury within the next three weeks. On April 1, 1961, Mr. Alex-

ander was assigned to work full time on the instant case. For the entire month of April, he reviewed and evaluated the evidence developed by the Postal Inspectors in preparation for presenting the case to a grand jury.

On April 27, 1961, a new United States Attorney entered on duty. Shortly after taking office, the United States Attorney advised the Chief of the Criminal Division that he was temporarily transferring Mr. Alexander to the Appellate Division of the office to prepare the briefs and to argue two cases of first impression involving the issue of insanity. These cases were *Overholser v. O'Beirne*, 112 U.S. App. D.C. 267, 302 F.2d 852 (1961) and *Jenkins v. United States*, 113 U.S. App. D.C. 300, 307 F.2d 637 (1962). The United States Attorney selected Mr. Alexander for these assignments because of his prior experience in the Appellate Division in cases on appeal involving insanity issues. In addition, there was a shortage of experienced personnel in the Appellate Division and the Chief of that Division had announced his resignation to be effective on May 21, 1961. The government's brief in *Overholser v. O'Beirne* was filed in the Court of Appeals on June 8, 1961, and the brief in *Jenkins v. United States*, was filed on June 23, 1961. The cases were argued by Mr. Alexander on June 27 and 28, 1961. In June, 1961, Mr. Alexander advised the United States Attorney that he intended to resign as Assistant United States Attorney to take a position in the Department of Justice. His resignation was effective July 3, 1961.

At the time that Mr. Alexander was temporarily assigned to the Appellate Division, it was intended that he would return to the Criminal Division and continue to prepare this case for presentation to a grand jury. Between the date Mr. Alexander announced his resignation and July 3, 1961, the case was not reassigned to another Assistant United States Attorney because no Assistant United States Attorney was available to handle this case in either the Criminal Division or the Appellate Division.

Shortly after Mr. Alexander's resignation, the United States Attorney informed the Chief of the Criminal Division that he

intended to request the Department to reassign the case to Mr. Alexander at the Department. On July 11, 1961, a letter containing this request was sent to Assistant Attorney General Herbert J. Miller. However, within two weeks subsequent to July 11, 1961, Mr. Acheson was notified that the instant case could not be reassigned to Mr. Alexander at the Department of Justice. Apparently, Mr. Alexander had been assigned to the investigation of the Bakers and Confectionary Union. Because of the complexity of that case, as well as the instant case, it was determined that Mr. Alexander could not work on the instant case.

Late in July, 1961, while visiting the Yale Law School, Miss Barbara A. Lindemann learned that the United States Attorney for the District of Columbia was seeking to hire an Assistant United States Attorney to prepare and prosecute the instant case. Shortly thereafter, Miss Lindemann, who had had experience in criminal fraud work, went to Washington, D. C. for an interview. At the interview, Miss Lindemann was advised that her primary duty upon appointment as an Assistant United States Attorney would be the prosecution of the instant case. At this interview, Miss Lindemann accepted the offer of appointment as Assistant United States Attorney, but was unable to enter upon duty immediately as requested by the United States Attorney because she had to move from New York City to Washington, and also because it was necessary that she have a security clearance from the Federal Bureau of Investigation before beginning work. Within the month following July 11, 1961, the United States Attorney advised the Chief of the Criminal Division that he had hired Miss Lindemann and that the instant case would be assigned to her for preparation and prosecution. Miss Lindemann entered on duty in the United States Attorney's Office on October 9, 1961. However, to avoid delay while waiting until she could be admitted to the Bar in the District of Columbia and until the United States Attorney's Office had the necessary budget to employ her, she started work on the case as a Special As-

sistant in the Department of Justice prior to her actually becoming an Assistant United States Attorney.

Shortly after October 9, 1961, Miss Lindemann contacted Postal Inspector Turner and requested that he assist her in the preparation of the instant case. She was advised by Inspector Turner that he was engaged in the preparation of another case which was then set for trial on November 15, 1961, and could not assist her. She received similar information from the Department of Justice when she indicated to the Department that she was trying to have the case ready for presentation to the grand jury on November 1, 1961, but had been unable to confer with Inspector Turner. Due to the unavailability of Inspector Turner, it was proposed by the Department of Justice that Postal Inspector Burrows be brought back from retirement to assist Miss Lindemann in the preparation of this case. Inspector Burrows commenced assisting Miss Lindemann on October 22, 1961.

On or about November 1, 1961, Postal Inspector J. C. Souder was assigned to assist Miss Lindemann and Inspector Burrows in the preparation of the case. Late in October, or early November, 1961, subpoenas *duces tecum* were served on the defendants for production of the corporate records. These were the first subpoenas issued by the United States Attorney's Office in the continental United States. These records were produced by the defendants and turned over to the prosecution. Many of the corporate files turned over to the prosecution were in a disorganized and deteriorated condition. Miss Lindemann and Postal Inspector Souder spent the month of November, 1961, cleaning the files, separating pages, organizing the files and determining the names and addresses of the clients. These files came from the basement of defendant Shea's house in Pennsylvania. Miss Lindemann correlated the corporate records of individual clients and transactions with the investigative reports which had been previously developed by postal inspectors. Late in November, 1961, Postal Inspector Burrows was unable to continue with the preparation of the case due to ill health, and he re-

turned to retired status. Postal Inspector Souder thereafter assumed Inspector Burrows' duties.

As a result of the production of the corporate records, Miss Lindemann and Postal Inspector Souder wrote to hundreds of clients whose names were disclosed by these corporate records, in order to determine whether they possessed information necessary to the preparation of the case for presentation to the grand jury, and subsequently for trial. This required several weeks and on occasion, additional correspondence was necessary. During the period between October 9, 1961, and January 12, 1962, Miss Lindemann interviewed approximately one-hundred potential witnesses and potential defendants. During this period, she devoted her full time and attention to this case, working overtime and on holidays. Similarly, Inspector Souder worked full time on the preparation of this case from the date he was assigned to the case until January 12, 1962.

In November, 1961, the United States Attorney assigned Assistant United States Attorney Donald S. Smith on a part-time basis to assist in the preparation of the case. In December, 1961, Mr. Smith was placed in charge of the prosecution and began full time participation in the preparation of the case. The assignment of a second Assistant United States Attorney to the case was necessitated by the vast number of exhibits, the size of the files and the number of witnesses involved.

The presentation of evidence before the grand jury in the instant case commenced on January 12, 1962. The grand jury heard evidence in the case on January 12, 19, 22, 23, 29, 30, 31, February 12 and March 13. A total of thirty-one witnesses appeared and testified during this time. Pursuant to a request of their counsel, defendant Hanrahan testified on January 30 and 31 and defendant Shea testified on February 12. Various co-defendants also testified, some of whom later appeared as witnesses at the trial on behalf of the government. On March 13, 1962, the grand jury voted a presentment and the indictment was returned on

March 26, 1962. Between January 8, 1962 and March 28, 1962, the grand jury heard evidence in a total of 240 cases. Between January 12 and March 26, 1962, Mr. Smith and Miss Lindemann worked full time on the presentation of this case to the grand jury and the drafting of the indictment.

The Court is of the opinion that on the basis of the foregoing, and in view of all of the facts and circumstances of this case as spread upon its voluminous record, the prosecution of these defendants was not conducted with such disregard of their interests that it can be said that the delay resulted from deliberate, or negligent, actions on the part of the prosecutor. On the contrary, it is the opinion of the Court that under the circumstances of this case the delay which took place was necessary for a fair and just prosecution of the charges of mail fraud.

After the first indictment was transferred from Puerto Rico, and until October of 1960, when the government formally announced its intention to bring a second indictment, the Assistant United States Attorney assigned to the case discussed it with the Department of Justice and with the United States Attorney, researched questions of law involved, filed written motions and oppositions and appeared in Court in matters pertaining to this case. It is apparent, however, that during the month of September, 1960, the United States was concerned with whether or not it could go to trial on the Puerto Rican indictment, and for that reason was not in a position to enter into extensive preparation for trial. Of course, during this time it would appear that the United States Attorney for the District of Puerto Rico was prepared for trial.

The defendants might contend that the dismissal of the first indictment was an attempt to relieve the government from its inability to go to trial within the time ordered by the Court on September 14, 1960. This is partially true. Certainly, the case as it then stood was fraught with difficulties, at least so far as the government was concerned,

especially in regard to the language barrier and the problems it would cause in prosecuting the case in this District. The most feasible solution was to obtain a new indictment involving continental victims. However, it was not just inability to go to trial within the time specified that dictated obtaining a new indictment. Indeed, as first suggested by defense counsel, it would have been quite difficult for the government to prosecute the Puerto Rican case in the District of Columbia no matter when it went to trial.

From the time the United States decided to obtain a new indictment until January of 1961, the prosecutor was awaiting the completion of Inspector Burrows' investigation of the remaining one-hundred continental cases. This investigation apparently was more extensive than had originally been anticipated. Although it was originally estimated that this investigation would take about two weeks, the report was not finally received until some three months later, during which time Inspector Burrows retired and Inspector Turner replaced him. The Court cannot find any evidence to indicate that the delay during this period was caused by deliberate or negligent acts.

Similarly, the delay which occurred between January, 1961, and the appointment of Miss Lindemann to work upon the case does not appear to have been deliberately or negligently caused. The defendants would make much of the fact that on many occasions the Department of Justice offered assistance to the United States Attorney in this matter. The defendants relate five such offers of assistance betwen June, 1960, and March, 1961. Aside from the fact that these seem to be part of the routine correspondence between the United States Attorney's Office and the Department of Justice, it appears that upon occasion, suggestions and advice were sought from, and that recommendations were made by, the Department of Justice. Obviously, some person would have to try this case and he alone could familiarize himself with it. Thus, although there were at least two offers of assistance during the period of January to March, 1961, it would appear that because of the diffi-

culties in the United States Attorney's Office, little could be done on the case in preparation for trial. In the opinion of the Court, and based upon the whole record, the actions of the United States from January through March, 1961, were neither deliberately nor negligently productive of delay. Certainly, the loss of these two and one-half to three months was unfortunate, but the Court cannot place legal blame for this loss upon the government. Its action was not unreasonable under all of the circumstances of this case.

During April, 1961, Assistant United States Attorney Alexander worked full time on the case. In May and June, as indicated, he was reassigned to the Appellate Division. The Court does not find fault with the action of the United States Attorney here. His decision appears reasonable under the circumstances, as does the failure to assign another prosecutor to the case. One must always keep in mind that this was an extremely complicated case. It would be absurd to assign someone else to it when Mr. Alexander was expected to return, even assuming that someone else was available, which was not the fact.

After Mr. Alexander announced his resignation, and after an attempt to have the case assigned to him in the Department of Justice, the record indicates that the United States Attorney, faced with a lack of experienced personnel, employed Miss Lindemann to handle the case. From the time she came on the case and until its presentation to the grand jury, there was at least one Assistant United States Attorney working on the case. For some of this time there were two prosecutors so working. Furthermore, for the majority of this time there was at least one postal inspector assigned to and working on this case. For a while there were two postal inspectors working on it. The Court finds no deliberate or negligent delay during this period.

As indicated earlier, it is the opinion of the Court that under the unusual and complicated circumstances of this most involved case, the delays which took place were necessary for fair and just prosecution of the charges. These de-

lays were not, under the circumstances of the case, caused by arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the government.

III Prejudice

In its opinion, the Court of Appeals has indicated that

> if . . . the court should find that the prosecution was conducted with such disregard of appellants' interests that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor and the prosecutor fails to show 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay,' then appellants' Sixth Amendment rights have been denied and the convictions must be vacated and the indictments dismissed.[4]

While, as previously indicated, the Court is of the opinion that there was no deliberate, or negligent, delay in bringing the instant prosecution, it would appear appropriate to discuss the question of prejudice as well as that of delay.

The Sixth Amendment guarantee "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[5] This right, then, affords a dual protection: against prejudice to a defendant's defense, and against prejudice to his person.[6]

The defendants' main contention as to damage suffered because of the delays in this case relates to their ability to defend themselves. In particular, the defendants point to the destruction of certain files of the Commercial Fi-

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[4] 121 U.S. App. D.C. 139, 348 F.2d 368

[5] United States v. Ewell, 15 L. Ed. 2d 627, 630 (1966).

[6] See generally, Note, *The Lagging Right to a Speedy Trial*, 51 Va. L. Rev. 1587 (1965).

nance Service Corporation and the prejudice resulting from their loss. In October, or early November of 1959, the corporate files of clients in the continental United States were moved to the house of defendant Shea in Pennsylvania. Other corporate records, including the files of clients in Puerto Rico, their financial records and the files on lending institutions, had been moved to the offices of the defendants' attorney. Upon transferring the continental files to Pennsylvania, defendants Hanrahan and Shea, and co-defendants Norwood and Rossiter placed them in the basement of Mr. Shea's house, on some boards laid out on the dirt floor. In March or April of 1960, a drain was blocked and the basement of defendant Shea's house became flooded. Many of the files were soaked. The basement was full of water for four or five weeks. Apparently, defendant Shea made no effort to remove the files from the flooded area, or to dry them out or otherwise preserve them, until October, 1960. At this time, defendants Shea and Hanrahan and co-defendants Rossiter and Norwood attempted to dry out these records, and it was discovered that a number of them were destroyed.

In the opinion of this Court, any difficulties experienced by the defendants due to the loss of these records cannot be attributed to the government. It appears clear that their destruction cannot be related in any causal manner to delays incident to the prosecution of this case. When the flood occurred which caused the ultimate destruction or damage to the files stored in Pennsylvania, the case was pending in Puerto Rico and the defendants were awaiting the outcome of their motion for change of venue. Certainly, the defendants could not complain that the time between their indictment in Puerto Rico and the flood in Pennsylvania was an unreasonable one, especially in view of the fact that two months at most before the flood the defendants were not prepared for trial.

It would appear that the files stored in Pennsylvania would have been useful in defending against the Puerto Ri-

can charges as well as in the District of Columbia. Certainly, any favorable testimony of satisfied clients would have been relevant to the allegations of a scheme to defraud. Furthermore, because the statute of limitations had not run as to many of the continental cases, common sense would indicate that these files should be preserved especially in view of the fact that the defendants knew that their activities were being investigated. On the basis of the record in this case, the Court can only conclude that these records were destroyed by an act of God, to which the carelessness of the defendants contributed, and that the government was in no way responsible for their loss.

It is also questionable whether in fact the defendants suffered substantial prejudice by the loss of these records. During the pendency of the second indictment, the defendants had available to them the names and addresses of several hundred potential witnesses. Among them were over 400 persons representing more than 400 business firms who were clients of the defendants in the continental United States; 124 persons who were clients of the defendants in Puerto Rico and the Virgin Islands; 206 persons and firms who were lenders with whom the defendants had contacts and 29 former employees of the defendants' corporation. The names and addresses of all of these potential witnesses were found in the corporate records produced by the defendants. Furthermore, the addresses of all potential witnesses were furnished to the defendants' attorney by the prosecutor during the trial in all instances where specific requests were made. It is interesting to note also that in their motion for change of venue, the defendants alleged that many of the witnesses they intended to call at the trial resided in the continental United States, and that they were without funds to bring these witnesses to Puerto Rico for trial. The names and addresses of 28 persons residing in the continental United States were referred to in this motion, none of whom were called as witnesses at the trial. It would be reasonable to expect that at least as to these last men-

tioned potential witnesses, the defendants would have preserved any corporate records in their possession.

In October of 1961, defendant Hanrahan gave Assistant United States Attorney Lindemann a notebook. This notebook contained certain corporate records of Commercial Finance Service Corporation and commentary by defendant Hanrahan. While in the possession of the prosecution, Postal Inspector Souder made a photostat of the notebook, which photostat became government exhibit 186 at the trial. After the return of the indictment, the notebook was returned to defendant Hanrahan. This notebook contained the names and addresses of 74 persons in sections defined as rejections and refunds. These names and addresses were available to or in the possession of the defendants at all times prior to the trial, although the corporate files for about 49 of the 74 alleged clients had apparently been destroyed in Mr. Shea's basement, and in about 22 instances there was no evidence to show that they were clients or that they had received money from the defendants. However, in preparation for the trial, the defendants attempted to contact only one of these allegedly favorable witnesses, notwithstanding the availability of all of their names and addresses. The conclusion is obvious that although the defendants were without a number of their corporate files, they were not without access to a substantial number of witnesses whose testimony they claimed would be favorable to them, but that either no attempt was made to call them or they were never contacted prior to trial. This is most interesting in light of the defendants' allegation in their motion for change of venue that many of their witnesses resided in the continental United States.

In their brief on appeal, the defendants argued that numerous witnesses were unable to recall events or to produce records. They mentioned Mr. Webb's loss of records, loss of memory by government witnesses Clark, Silverman, and Futtrup, and the loss of Mr. Burke's testimony.[7] At the

[7] Brief for appellant, pp. 5-6. *Hanrahan v. United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965).

instant hearing, the defendants again mentioned the loss of memory and records by Mr. Webb. Apparently, Mr. Webb's wife had been taken ill and was confined to a hospital in New Mexico. Her condition was quite serious and to make her think she might be getting well, Mr. Webb kept sending her his records and other things in an attempt to encourage her to retain her interest in his affairs. In the spring of 1960, Mrs. Webb was transferred from New Mexico to a hospital in New York. She died in New York in October of 1960. Mr. Webb's records were lost at about the time of the transfer of Mrs. Webb from New Mexico to New York, apparently in the spring of 1960.[8] Obviously, these records were lost either while the case was in Puerto Rico or soon after its transfer to the District of Columbia. It is the Court's opinion that any prejudice resulting from the loss of these records could not be attributed to delay in the prosecution of this case. No substantial delay had taken place, prior to the loss of these records, which could in any way be attributed to the government.

During the course of the remanded hearing, defendant Hanrahan, through his counsel, attempted to introduce evidence to the effect that his wife suffered a mental breakdown and that this had an effect upon him.[9] The Court will assume that the families of all of the defendants suffered during this prosecution and that naturally this affected the various defendants. Certainly every defendant subject to prosecution will undergo some hardship, including anxiety and loss of income. The question is always one of degree. However, this is something these defendants should have taken into consideration before embarking upon the scheme of which they stand convicted. Furthermore, it is apparent that during the entire period from the institution of the prosecution in Puerto Rico until the completion of the trial in the District of Columbia, these defendants were enlarged upon bond.

[8] See 15 Tr. Transcript 1707-1726.

[9] See H. Transcript, pp. 1060-1073.

During the trial of this case, it was ascertained that one of the defendants, Francis Burke, was confined in the psychiatric ward of New Rochelle Hospital, New Rochelle, New York. Accordingly, in April of 1963, a mistrial was declared as to this defendant. Later, on November 6, 1963, Judge Youngdahl granted defendant Burke's motion to dismiss the indictment against him for lack of a speedy trial. In so doing, he indicated that Burke's precarious mental condition would have made trial oppressive. Noting that this defendant was merely one of the selling agents for the group of men behind the alleged fraud, the Court pointed out that "the interest of society in punishing this particular individual at this time is slight – especially in view of the emotional punishment which the defendant has already received."[10] The considerations which led to the dismissal of the indictment against defendant Burke do not require dismissing the indictment as to these defendants. There is absolutely no indication that they have suffered hardship anywhere near as severe as suffered by Burke, nor was there any proffer to that effect. Furthermore, as distinguished from the *Burke* case, the interest of society in punishing these defendants is by no means slight, as they were the instigators and perpetrators of the scheme to defraud.

Finally, we come to the loss of memory by the various witnesses, and the loss of defendant Burke's testimony due to his emotional breakdown. It is difficult to estimate to exactly what degree the defendants were harmed by the failure of witnesses to remember certain facts. However, upon an examination of the record, the Court is of the opinion that this damage is not of such a serious nature as to compel dismissal of the indictment. It is then the opinion of the Court that on the whole record of this case, and taking into consideration all of the circumstances, the government has demonstrated that the defendants suffered no serious prejudice as a result of the delays which did not ensue from the ordinary and inevitable delay.

[10] *United States v. Burke*, 224 F. Supp. 41, 47 (D.D.C. 1963).

For the foregoing reasons, and based upon the entire record of this case, the Court is of the opinion that the defendants have not been deprived of their Sixth Amendment right to a speedy trial. Furthermore, the Court is of the opinion that no unnecessary delay under Rule 48(b)[11] is present which would require the Court, in the exercise of its discretion, to dismiss the indictment.

John J. Sirica
United States District Judge

June 24, 1966

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[11] Fed. R. Crim. P. 48(b)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 389

JOHN W. TYNAN, GENE Z. HANRAHAN AND WILLIAM T. P. SHEA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 19, 1963, petitioners were convicted in the United States District Court for the District of Columbia on seventeen counts of mail fraud in violation of 18 U.S.C. 1341; each was sentenced to serve from twenty months to five years in prison on each count, the sentences to run concurrently. On June 24, 1965 the Court of Appeals for the District of Columbia remanded the case to the district court to determine whether the delay in bringing petitioners to trial violated the Sixth Amendment or Rule 48(b), F.R. Crim. P. *Hanrahan* v. *United States,* 348 F. 2d 363 (C.A.D.C.) (Pet. App. A). On remand, the district

273-270—67

court concluded that petitioners were not deprived of their Sixth Amendment rights and that the delay was not of such a nature as to warrant dismissal pursuant to Rule 48(b). 255 F. Supp. 957 (Pet. App. C). That determination was affirmed on appeal, 376 F. 2d 761 (Pet. App. B), and is the subject of the present petition.

The factual background is set forth in detail in the opinion of the district court (Pet. App. C); a summary follows.

1. Prior to the hearing on the remand, petitioners Shea and Hanrahan had filed affidavits of prejudice pursuant to 28 U.S.C. 144, alleging that Judge Sirica was biased because of certain statements he had made during the course of the trial. Those statements related to the credibility of petitioners as well as to the issue of delay (Pet. 4–6). The judge refused to recuse himself, because both the affidavit and the certificate of good faith were legally insufficient. 248 F. Supp. 471. The court of appeals found this ruling correct, since the allegations of bias failed to asert that the judge's views were derived from any source other than the judicial proceedings themselves. Petitioners do not challenge that ruling.

In this Court, they assert that the trial judge should have disqualified himself for personal bias as a matter of due process because, during the trial, he had expressed doubt as to credibility of some of the petitioners. The statements had been made at trial and were based on the evidence produced; in no way do they indicate that the judge could not fairly decide

the discrete issues posed on the remand. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583.

The issues considered on the remand did not relate to the guilt or credibility of the petitioners, but rather to the causes for the delay in bringing petitioners to trial. None of the petitioners testified at the remanded hearing. It is therefore difficult to perceive how the alleged opinion of the judge concerning petitioners' guilt or credibility could be said to have influenced the determination of whether there had been unnecessary delay. While it is true that the judge did express an opinion as to the merits of the petitioners' argument concerning delay, that declaration was made after a previous motion based on the lack of a speedy trial had been denied by another judge. Petitioners in no way support their attack on the fairness of the remanded proceeding by pointing to any partiality displayed by the judge at that hearing.

2. Petitioners' contention that, in reviewing the remanded proceeding, the court of appeals ignored its previous mandate to the district court is totally lacking in substance. In its first opinion the court of appeals ordered the district court to determine whether all the delay attributable to the government was necessary for a fair and just trial of petitioners on the charges. It then said that if the court should find that the prosecution was the result of deliberate or negligent delay "and the prosecutor fails to show 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay,' " then the conviction should be set aside.

Judge Sirica, in his exhaustive opinion, found that the original prosecution had been properly brought in the District of Puerto Rico and that it had not been brought there for any "supposed advantage." The judge also stated "that under the unusual and complicated circumstances of this most involved case" the delays were not "arbitrary [or] capricious," but were on the contrary, "necessary for fair and just prosecution of the charges" (Pet. App. C 49–50). He also found that there had been no prejudice to the petitioners resulting in increased difficulty in defending themselves[1] (Pet. App. C 50–56). The court of appeals after having "carefully considered" the case for the second time declared that upon the entire record, "measured by the mandate of this court fashioning the issues," the findings and rulings of Judge Sirica were amply supported by substantial evidence (Pet. App. B 27).

Petitioners argue that neither the district court nor the court of appeals found that "all" the delay was

[1] Petitioners' chief reliance in this regard was placed upon the fact that numerous records in their possession were destroyed by a flood during the pendency of the case. They claimed that destruction of these records, containing the names and addresses of certain satisfied clients, hindered them in obtaining testimony of these clients. Judge Sirica decided that, since the records were destroyed while they were in the petitioners' possession and during the pendency of the charges in the Puerto Rican court, the delay was not a proximate cause of their destruction and that the actions of the government did not contribute to their destruction. The judge further pointed out that at all times the petitioners had in their possession names and addresses of satisfied customers residing in the United States who could have testified on behalf of petitioners but were never called (Pet. App. C 51–53).

necessary and that the record showed that some delay attributable to the prosecution was unnecessary. This argument ignores the district court's finding, on which the court of appeals relied (see Pet. App. B 24), that the government "has demonstrated that the defendants suffered no serious prejudices as a result of the delays which did not ensue from the ordinary and inevitable delay." That finding was in the express terms of the mandate of the earlier appellate opinion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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